IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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SUPREME COURT, U.S.

No. 77-5898

MAURICE C. PROCTOR

PETITIONER,

VERSUS

WARDEN, MARYLAND PENITENTIARY

RESPONDANT.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

November 28, 1977

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THE PETITIONER, MAURICE C. PROCTOR, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGEMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ENTERED IN THIS PROCEEDING ON AUGUST 11, 1977 AND REHEARING EN BANC, NOVEMBER 2, 1977.

OPINION BELOW

THE OPINION OF THE COURT OF APPEALS IS UNREPORTED IN SLIP OPINION NO. 76-8315 (Fourth Circuit, 1977) AND THE ORDER DENYING REHEARING APPEARS IN THE APPENDIX THERETO. THE OPINION OF THE DISTRICT COURT OF MARYLAND APPEARS, IN THE APPENDIX THERETO.

JURISDICTION

THE JUDGEMENT OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS ENTERED AUGUST 11, 1977. A PETITION FOR REHEARING ENBANC WAS FILED AND SUBSEQUENTLY DENIED NOVEMBER 2, 1977. THIS PETITION FOR CERTIORARI WAS FILED WITHIN 30 DAYS OF THAT DATE. THIS COURT'S JURISDICTION IS INVOKED UNDER 28 U.S.C. SECTION 1254 (1).

QUESTIONS PRESENTED

1. That Petitioner's guilty plea was unconstitutional because he was not fully appraised by the trial court or his counsel of his right against compulsory self-incrimination.

2. That Petitioner's Trial Counsel was incompetent and did not provide him with genuine representation violated his fifth, sixth and fourteenth amendments to equal protection and due process.

3. That Petitioner's home was illegally searched by A Fatally Defective Search Warrant the Prosecution Engaged in Melicious Misconduct.

4. That Petitioner was denied a fair and complete Evidentiary Hearing in the Court below and the State Courts.

REASON FOR GRANTING PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully moves this Honorable Court for a Petition for Writ of Certiorari pursuant to Rule 53 of the Supreme Court of The U. S. Procedure. Petitioner contends inter alia; that there exists substantial question of law regarding controlling ' Jurisdiction ' in Petitioner's litigation before the federal courts. Moreover, Petitioner stresses that he initiated Habeas Corpus Proceedings in the United States District Court for the District of Maryland on September 16, 1975 pursuant to Title 28 U.S.C. Section 2241 thru 2254 contesting the unconstitutionality of his unlawful confinement in custody of the Respondent against his will in restraint of his liberty in violation of the laws of the United States and Maryland. Petitioner's petition was filed according to and with the Habeas Corpus Act, Article 2 United States Constitution. Contrary to the Court's finding below which based its determination on the Civil Rights Act Statue, Title 42 U.S.C. § 1983 which deals exclusively with Civil Rights violation in the nature and scope of torts, damages, etc. Petitioner notes, particularly, that he has never, at anytime invoked the Civil Rights Jurisdiction to contest this case at bar or to confer upon this court nor the court below authority to hear and determine his case according to that statutory provisions, considering the court's liberalistic interpretation of his Pro Se petition or application should not have been construed to be otherwise than as set forth. See: Haines V. Kerner, 404 U.S. 519 (1972). The Civil Rights Act provision does not prescribe remedies or relief for Petitioners seeking ' custody relief ' . See Preiser V. Rodriguez, 93 S. Ct. 1827, 36 L. Ed. 439 (1974). There the United States Supreme Court Said:

"....But we need not in this case explore the appropriate limits of Habeas Corpus as an alternative remedy to a proper action under Section 1983. That question is not before us. What is involved here is the extent to which section 1983 is a permissible alternative to the traditional remedy of Habeas Corpus. Upon that question, we hold today that where a state prisoner is challenging the very fact or duration of his

physical imprisonment and relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a Writ of Habeas Corpus, according, we reversed the judgement before us."

The Petitioner further quotes from the rationale of the Supreme Court in safeguarding the rights of the accused who has suffered constitutional deprivations. It said in Fay V Noia, 372 U.S. 391 at 401 "... Its root principal is that in a civilized society government must always be accountable to the judiciary for a man's imprisonment; If the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." (Emphasis Supplied) Petitioner argues from the posture that if the court below had reviewed his " application for leave to appeal " in the light and under the Civil Rights Act jurisdiction and predicated its finding and conclusion, then it follows that Petitioner has been substantially denied a fair and complete Evidentiary Hearing in the District Court appellate review, therefore, an Enbanc Review Hearing was a Judicial Necessity for the proper and orderly administration of Justice and Due Process. The Practice complained of has departed from the principles of Equal Protection and Due Process, as to call to exercise this Court's powers of supervision.

STATEMENT OF CASE

On September 16, 1975, The Petitioner, Maurice C. Proctor, in Proper Person, filed in the United States District Court for the District of Maryland a Petition For A Writ of Habeas Corpus pursuant to Title 28 U.S.C. § 2241 thru 2254. He sought relief on several grounds of constitutional magnitude. To wit:

1. That his guilty plea was unconstitutional because he was not fully appraise by the trial court or his counsel of his right against compulsory self-incrimination. That he did not freely, voluntarily and intelligently waived his constitutional rights intentionally.

2. That Petitioner's trial Counsel was incompetent and did not provide him with genuine representation violated his fifth, sixth and fourteenth amendments to equal protection and due process. That counsel failure is in the following areas:

a. To properly investigate and prepare defense of case

b. To file necessary pretrial and postrial motions, e.g. speedy trial, suppression, dismissal and appeal.

3. That Petitioner's home was illegally searched by a fatally defective search warrant and the prosecution engaged in malicious misconduct.

4. That Petition was denied a fair and complete evidentiary hearing in the court below and the state courts.

The District Court Issued an " Order to Show Cause " on September 18th, 1975 to be issued on or before October 31, 1975. The Appellee filed a Motion for Extension of Time on October 28, 1975. Motion was granted October 29, 1975 to include extension to November 15, 1975. Petitioner filed on October 31, 1975 Motion For Mandamus to Compel Obedience to Mandate in the United States District Court of Maryland and Motion for Summary Judgement in opposition to Respondent's Motion. On July 2, 1976 the District filed a Memorandum and Order denying relief as prayed by the Appellant, but found that appellant issue regarding incompetent counsel denied him of effective assistance of counsel and did not represent his best interest. However, the cour did not afford appellant opportunity to prove this contention and finding.

Petitioner entered a notice of appeal to this court on August 2, 1976. On December 21, 1976 Petitioner's Motion for Extention of time to obtain records, documents and transcripts pertinent to the issues raised in the light of not utilizing the discovery rules below. Motion was unofficially granted, in that, Petitioner was not notified whether the court granted his Motion or denied it. However, On Agust 11, 1977, This Court Decided Petitioner's Appeal and affirmed the ruling below. It is noteworthy to point-out this affirmacy was predicated on A Civil Right's Statue Title 42 U.S.C.

§ 1983 and not the Habeas Corpus provisions, which invalidates this court holdings if said ruling is correct. Petitioner again Motioned this court for additional extension of time, because he was unable to secure the record, documents, and transcripts necessary to effectuate an effective appeal. The Motion for extension of time was granted, but no mention of the Motion for appointment of counsel or request for production of documents to Rule 10, 11 of Fed. R. App. Procedure. See (Exhibit) i

STATEMENT OF FACTS

The Petitioner was convicted in the Criminal Court of Baltimore City of the State of Maryland on September 18, 1973 in a Plea Bargain, to count (1) one in Criminal Indictment # 6809 -11/70; count (1) one Criminal Indictment # 6810-11/70 involving violations of Narcotic Laws of Maryland; to count (1) of Criminal Indictment # 6811-11/70 the unlawful possession of a handgun, the sentences of twenty (20) years and 3 years to be served concurrently. Appeal therefrom was not noted or entered.

On January 8, 1975, Petitioner intitiated his first post conviction petition pursuant to Article 27, Section 645 A-J of Maryland Annotated Codes, and BK 40 esq. of Maryland Rules of Procedures. On March 12, 1975, Petitioner moved to supplement post conviction to include: Exhibit (g)

1. Illegal search and seizure
2. Inadequacy of counsel
3. Illegal sentence
4. Prosecution misconduct

Incomplete evidentiary hearing was conducted on June 6, 1975 where counsel was appointed to represent him. The hearing court limited its findings and review to only the contentions raised on the original post conviction petition and denied relief sought thereafter. Petitioner was advised by appointed counsel to enter on his own behalf a notice for leave for application for an appeal. July 8th, 1975 Application was denied

by the Court of Special Appeals of Maryland. Petitioner filed a Writ of Habeas Corpus in the United States District Court for the District of Maryland contending that his confinement was in violation of the Laws of the United States inter alia., relief prayed was denied July 2, 1976. Petitioner noted this Appeal which was reviewed and affirmed August 11, 1977. Petitioner is now seeking Rehearing Enbanc and wishes to note that he is and has been proceeding in both the federal courts and state courts without the necessary documents or records and transcripts to effectively have reasonable access to the court, to appraise this court of the grave constitutional violations herein.

ARGUMENT

I. That Petitioner's guilty plea was unconstitutional because he was not fully appraised by the trial court or his counsel of his right against compulsory self-incrimination.

The Petitioner directs this court to the United States Supreme Court's line of cases regarding plea bargain and guilty pleas. The Court has set standards and guidelines by which pleas are to be negotiated by. See: Santobello V. New York, 404 U.S. 257; Brady V. United States, 397 U.S. 742, 751, 752; A.B.A. Standards relating to Pleas of Guilty 1-3 (approved draft 1968) or ALI Model Code of pre-arraignment procedure section 350.0 commentary (1975). The Court has held repeatedly in recent years that a guilty pleas is a lawful trial where standards are adhered to and where feasible, the court has encouraged and condoned its practice. Its most recent opinion expounding on this rationale is Blackledge V. Allison, Slip Opinion No. 75-1693, decided May 2, 1977 at page 7 (II) The Court Said: ..."Whatever might be the situation in an ideal world, the fact is that the guilty pleas and the often concomitant plea bargain are important components of this country's criminal justice system, properly administered, they can benefit all concerned. The defendant uncertainties of a trial he gains a speedy disposition of his case, the chance to acknowledge his guilts, and a prompt

start in realizing whatever potential there may be rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings "....." although noting that in collaterally attacking a plea of guilty a prisoner ' may not ordinarily repudiate ' statements made to the sentencing Judge when the plea was entered, the court observed that no procedural device for the taking of Guilty pleas is so perfect in design and exercise as to warrant a per se rendering it Uniformly Invulnerable to subsequent challenge." The Allison Court further noted that inspite of the defendant's in court declaration of his predicated on the advise of counsel, he also was advised to conceal any plea bargain from the trial court and that his denial of any promises had been made might have been a courtroom ' RITUAL MORE SHAM THAN REAL '; The Court relied upon the following authorities to substantiate their holding: United States V McCarthy, 433 F. 2d 291, 293 (CA 1); Walters V Harris, 460 F. 2d 983 (CA 4); United States V Williams, 407 F. 2d 940; 947-949 Note 13 (CA4); Bryan V United States, 492 F. 2d 775, 780-781 (CA 5) Moody V United States, 497 F. 2d 359, 362-363, and n. 2 CA 7); Fountaine V United States 411 U.S. 213, Machibroda V. United States, 368 U.S. 487. The Petitioner's contention contention based upon the foregoing authorities supra, as cited by the Supreme Court to the affect that a Guilty Plea, par se, is not so insurmountable or formidable as not to be collaterally attacked where the plea is invalid. In Menna V. State of New York, Slip Opinion, No. 75-5401, decided November 17, 1975 the court said at page 3, n. 2..... "Neither Tollett V Henderson, 411 U.S. 258, Nor our earlier cases on which it relied, e.g. Brady V. United States, 397 U.S. 742, and McMann V. Richardson, 397 U.S. 759, stand for the proposition that counseled guilty pleas inevitably WAIVE all antecedant constitutional violations. If they did so hold, the New York Court of Appeals might be correct. However, in Tollett we emphasized that ingrediant of this line of cases, id., at 266. The Point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it

quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A Guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt is validly established. Here, however, the claim is that the state may not convict petitioner no matter how validly his factual guilt is established. The Guilty Plea, therefore, does not bar the claim." The Petitioner invokes the same rationale employed in the Menna and Allison Court and their companion cases, where inspite of what may appear to be overwhelming evidence against him, he has satisfactory demonstrated at the Post Conviction Proceeding that his Guilty Plea was involuntary given and his Attorney was incompetent, thus, his conviction cannot stand. The court below relied exclusively on the Post Conviction and Trial Transcripts to make its determination as to Appellant voluntariness to his guilty plea, in its extensive Memorandum and Opinion the Court attempts to or is deliberately ambiguous unclear or vague in so far as demonstrating that the trial court and counsel had full appraised the Petitioner of his right against compulsory self-incrimination and that no unfavorable inference would be made if he elected to stand trial with a jury.

At page 4 thru 5 the District Court quotes colloque at trial court which is as following:

"Mr. Howard (defense counsel): For the record, Your Honor, I have had extensive conversations with my client regarding these indictments and I have advised him of all of his rights as to a jury trial and a plea of not guilty. I have advised him that on a guilty plea and a statement of facts is giving up hisright to a confrontation of witnesses in order to cross examine them. I have also advised him that he is giving up his right to produce witnesses and other defense motions he would have as to the chain of custody in this case.

For the Record, Have I stated it correctly, Mr. Porter?

"The Defendant: Yes.

"Mr. Howard: And, you agree to waive all those rights?

"THE COURT: Before the Court can accept the plea of guilty, it must be shown that the plea is voluntary and not through my threats or inducements and with the understanding of the nature of the plea and the possible consequences of the plea. I want to be sure that he is doing it consciously and he is waiving and giving up his rights guaranteed to him by the Maryland and the Federal law.

" Do you want to tell him about the consequences of the plea?

" Mr. Howard: For the Record, a plea of guilty would leave nothing for the Court except to hear the statement of facts and impose the sentence and the maximum is twenty-five years on the first two indictments and the third indictment can be a three year sentence and a thousand dollar fine. " (Tr. 3-5)

Petitioner points out further where the court below stated in support of its finding, it said: " . . . . Although the colloquy between petitioner and the judge was virtually non-existent (emphasis supplied), the record indicates that petitioner had been advised of his rights by his attorney."

Petitioner contends that the record is silent as to the court or the counsel appraising him of his constitutional right to his sixth amendment and fifth amendment rights of self-incrimination contrary to the dictate and standard established by Boykins. The Trial Court, Post Conviction Court and the Federal Court had a mandatory duty to resolve any and all constitutional questions of law before entering its decree. Moreover, the Petitioner invites the court to consider also what the Supreme Court said in Henderson V. Morgan, 462 U.S. 637 n 7 ..... "A plea may be involuntary either because the accused does not understand the nature of the constitutional protection that he is waiving, See. e.g. Johnson V. Zerbst, 304 U.S. 458, 464-465; or because he has such an incomplete understanding of the charge. That his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him or proof that he in fact understood the charge the plea cannot be voluntary in this latter sense. Smith V. O'Grady, 312 U.S. 329." at p. 2 . . ." Plainly, a defendant cannot intelligently reach that conclusion if he does not know the elements of the crime to which he is pleading and therefore does not know what the state has to prove; and his ignorant decision to plead guilty under such circumstances is not a reliable indication that he is in fact guilty W Likewise appellant contends that the elements of the crime and the intent were necessary elements of the offense in which he was not appraised nor did the state or the appellee prove that the Appellant " waived his constitutional rights voluntary or intelligently, since it becomes the states' burden of proof to show that ap-

pellant intelligently, relinquished known rights. See Johnson V. Zerbst, Supra. For the Most part in the State of Maryland the case law controlling guilty pleas are substantially the same as enunciated in the Supreme Court's case laws and citations. Of William V. State, 10 Md. App. 570; McCall V. State, 9 Md. App. 191; English V. State, 298 A 2d 464; Davis V. State, Supra, McCarthy V. State, P.C.P.C. 2393, 8/31/73. In McCarthy V. State, Supra, The Post Conviction Judge recognized the dilemma attatched to construing the situation whether an accused infact understood his constitutional rights very succintly and uniquely paraphased the question at p. 5-6 when it said: ...." I don't think there is any question over the fact that Mr. McCarthy is an intelligent person. Judge O'Donnell sensed that, and I do too in this proceeding; but that doesn't answer the question, unfortunately, it is WHAT IS IT THAT ONE HAS TO BE INTELLIGENT ABOUT? I guess that is an awkward way of putting it but I guess that is really what it comes down ********** that the record before Judge O'Donnell, and the record made in this court doesn't affirmatively establish that the defendant was fully appraised of the ramifications of his right to protection against self-incrimination; nor does it show that he understood these rights and knowlingly waived them". In that case, i.e. The McCarthy, the Judge reversed the conviction, bottom on the English case, cited supra. The Petitioner's case is identical insofar as circumstances and situation and not as to the type of offense. In the English Case, On March 30, 1971, in the Criminal Court of Baltimore, Richard English pleaded guilty to the 1st count of the indictment presenting that on November 28, 1970 that he unlawfully distributed heroin, His plea was accepted and he was sentenced to 5 years. He appealed (emphasis added) and claimed that the plea was not freely, voluntarily and intelligently made. The case went before the court of special Appeals of Maryland, where the record disclosed that both the court and defence counsel made extensive inquiries of English to determine the voluntary nature of his, plea. Their inquire was comprehensive except for the right against compulsory-self-incrimination. The record did not show, explicitly that he intelligently understood and waived that right. The Court of Special Appeals said in reversing English

..." Unless the record affirmatively shows that he, the defendant understood this privilodge and waived it in the constitutional sense, acceptance of his guilty plea is not effective". English V. State, Supra.

Aplea of guilty must be made with the probable consequences in mind, including the maximum sentence the defendant can receive if convicted. Marvel V. United States, 380 U.S. 262 (1962). If a plea is not knowingly made, it cannot be accepted by a trial court or used to convict a defendant. Such a conviction is obtained in violation of the guarantees of due process to which an accused is entitled, and is therefore void. McCarthy, supra; Boykin, supra; Machibroda V. United States, 368 U.S. 487, 493 (1962); Herman V. Claudy, 350 U.S. 116, 120-121 (1956); Cf. Waley V. Johnson, 316 U.S. 98, 104 (1942), the United States Supreme Court noted the importance of the guilty plea in criminal trial practice and its meaning for defendants: ... " A plea of guilty differs in purpose and affect from a mere admissionor an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgement and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilt shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences . Id. at 223 (emphasis added)". the doctrine identified in Kercheval was articulated in Boykins V. Alabama, supra, the Court described due process requisites associated with the guilty plea. It held that an offer of a guilty plea by an accused cannot automatically be treated as a knowing and voluntary waiver of rights. A trial court first must be convinced that a defendant both understands the significance of a guilty plea and intends to waive his rights before it accepts a plea. Even thougha defendant is represented by competent counsel, a trial judge still may not accept the plea unless he has determined that it is both knowing and voluntary. Moreover, Petitioner contends that Boykin did not establish new substantive law. It created no new rights to be enjoyed by criminal defendant and no new test of waiver to be applied where a guilty plea is used to support a conviction. It merely established that the absence of

any indication in the record that a guilty plea was knowing and voluntary is reversible error. There the principal concern of the court in Boykin was the same due process issue first identified in Kercheval which held..." What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused, to make sure he has a full understanding of what the plea connotes and of its consequences. Boykins, Supra ".

Finally, The Petitioner contends from the overall perspective that the most important consequences of which an accused must be aware before his guilty plea is accepted by a trial court is his right against self-incrimination and the length of time he may be deprived of his liberty or the maximum sentence he can receive for his offense if convicted. Moreover, argues that because he was a first offender in the State of Maryland , he was in fact promised a term of 10 years instead of twenty (20) that his expectation from his counsel's advise, that the court would only impose 10 years. In Bailey V. MacDougall, 392 F. 2d 155 (4th Cir.) Cert. Denied, 393 U.S. 847 (1968), This Court voided a prisoner's guilty plea entered in 1936 because "No One-Court or Counsel - ascertained that Bailey Understood the consequences of his plea " In the Collateral proceedings brought by Bailey in State Court in which he challenged the voluntariness of his plea, his trial counsel testified that prior to the entry of the plea he had explained to Bailey in State proceeding that the guilty plea meant a life sentence would be imposed and the governor might not follow the pardon or parole recommendation of the State Officials. Trial counsel further testified that Bailey might not have understood the consequences or the import of the warning. Bailey claimed that he understood the consequeheos of his plea even though trial counsel had explained them to him. Id. At 161. supra. The Bailey doctrine should apply to the instant case, in that, the petitioner not only contends that he lacked an understanding of the consequences for entering a guilty plea, but also that no attempt to explain full those consequences was ever undertaken by the court of his counsel, particularly to his absolute right to remain silent. The Memorandum and Order of the District Court, relied exclusively on the state's finding therefore, was precluded from making a fair asses-

ment of petitioner's claims. Petitioner pointsout in support of the Bailey Doctrine, the Third Circuit of the United States Court of Appeals also adopted a similar view of the same rationale in so far as establishing guidelines and standards and proper function of the trial court in accepting a defendant's guilty plea: " Trial Courts have a duty to do more than simply listen to an articulation or a verbalization of a plea of guilty by a defendant; they have a duty to insure that the defendant understands the consequences of his act. 404 F. 2d 794." Appellant contends that the duty to insure that he understood the direct consequences of his guilty plea was wholly abdicated by the trial court in which he was convicted and sentenced. Under the rule first adopted in this circuit in Bailey V. MacDougall, supra, the burden of proof as to a defendant's knowledge and understanding of the consequences of his guilty plea is on the state. See also Smith V. Cox, 435 (4th Cir) 1970 Ware V. Cox, 324 F. Supp. 568 E.D. Va. 1971.) Thus, once a Habeas Corpus, petitioner alleges that his plea was involuntary, the burdern shifts to the state to demonstrate that the plea was properly accepted by the trial court and is not invalid. In Ware V. Cox, The Federal Court found, after reviewing a record produced in State Habeas proceedings, that the petitioner's counsel did not inform him of the possible length of sentence if he was convicted. That failure was held reversible error as the State of Virginia, had not demonstrated either:

1. That the Petitioner in fact knew the consequences of his plea or
2. That it was likely he had obtained information from another source before pleading guilty.

In the instant case neither of the above has been demonstrated, therefore, it follows that a reversal would appear mandatory or the very least a remand to the District Court for further hearing to determine Petitioner's Claims.

ARGUMENT II

That Petitioner's Trial Counsel was incompetent and did not provide him with genuine representation violated his fifth, sixth, and fourteenth amendments to

equal protection and due process.

The Petitioner contends that although counsel was employed by him to represent his best interests, in so far as the instant case at bar, his duties and responsibilities were no greater or no less than the general functions of any other counsels' or members of the legal profession. That the Sixth Amendment of the United States Constitution ensures every accused defendant the right to genuine effectiveness of assistance of counsel. That hired attorneys are duty bound by the same Standards of competency as court appointed attorneys.

Most recently this court reestablished competency standards in Marzullo V. Maryland, 9/2/77 CrL 2545, relying upon McMann V. Richardson, 397 U.S. 749 (1970) Coles V. Peyton, 389 F. 2d 224 (4th Cir. 1968) U.S. V. Decoster, 487 2d 1197, (CA DC 1 973) U.S. V Ester 539 F 2d 663, (CA 8 1976) Holding the Normal Competency Test, which is first determined whether the defense counsel's representation within the range of competence demanded of attorneys in criminal cases. There in the Marzullo Court, The Court said: ... " An Attorney's conduct by comparison with the competence generally found in the profession", and " requires an objective assessment of counsel's adequacy " although the court did not stress or assured "errorless" representation but it orphasized that a criminal defendant against " flagrant " error that results from "Neglect" or Ignorance" rather than from informed professional deliberation. The Marzullo Standard is controlling in the fourth (4th) circuit and the instant case, the applicability of its holding is overwhelmingly compelling. First, and foremost reasons are, counsel for the petitioner through neglect or ignorance or both fail to properly prepare, investigate or to file necessary pre-trial motions and post-trial motions, in addition, to improperly advising the petitioner to plead guilty, as well as not advising him that he had the right against self-incrimination or that no unfavorable inferences will be made if he elects to have a trial by a jury in the absence of the trial court failure.

Petitioner argues that the records should reflect (See Exhibit (A)) that petitioner

was arrested in the month of November 1970 for narcotics violations for selling narcotics to undercover agent or cadet of the Baltimore County Police Department, he was subsequently indicted January 8, 1971 in Criminal Indictment Number 6809-11/70 from his initial arrest and subsequent trial appellant's counsel only filed one (1) Motion and that being one of Discovery-and-Inspection. However, during this period from January 8, 1971 to September 18, 1973 the day of his entering a guilty plea, a total of 32 month under indictment pending trial, a pre-trial motion of Speedy Trial would have precluded him from going to trial because of the length of delay. Moreover, the appellant has been informed that the State's eyewitness the Cadet-Agent was on tour of duty in the Viet Nam Conflict during this 32 month period of time and was unavailable to testify at trial. Moreover, the question whether the counsel had used tactical strategy in waiting until the witness returned from this tour of duty. The appellant cannot conslusively say. However, it did in fact, prejudice appellant and precluded him from the opportunity to have a fair and speedy trial and substentially deprived him of his constitutional rights under the fifty and fourteenth Amendments as is applicable to the State. The Petitioner argues that the total circumstances of the various factors involved in the instant case and the psychological affects of the strain and stress which he suffered during this period of uncertainties was one of the major factors that caused him to surrender to a guilty plea. Notwithstanding the fact that he had no obligation to expedite or bring himself to speedy-trial. The Supreme Court recognized the adverse affects in which a prolonged trial incurs, in Strunk V. United States, 412 U.S. 434 at 439 it said: " The speedy trial guarantee recognizes that a prolonged delay may subject an accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a senteco longer than, or consecutive to, the one he is presently serving ..... uncertainties that a prompt trial removes". (emphasis supplied) Other pre-trial motions as Bill of particulars, Suppression and for dismissal were equally important in that, they were necessary integral part of Petitioner's trial foreclosed

him from an actual trial. The failure of counsel to properly investigate and prepare investigate and prepare the defense for the petitioner is clearly ineffectiveness of counsel. Moreover, the record does not reflect that petitioner sought or obtained postponements or continuances during the same period of time, therefore, it cannot be said that petitioner contributed to this length of delay. Here again the petitioner takes the liberty to quote from the United States Supreme Court where they hold that pretrial proceedings are as vital to the defendant in a criminal trial, as the trial itself. In Brewer V. William, Slip Opinion, No-74-1263 at pages 9-10, the court said: ... " This right guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of Criminal Justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable works for the court 44 years ago in Powell V Alabama, 287 U.S. 45 at 57 ... ' (D)uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendant did not have the aid of counsel in any real sense, although they were as much entitled to such aid of counsel during that period as at the trial itself ' ********** There has occassionally been a difference of opinion within the Court as to the preipheral scope of this constitutional right. See: Kirby V. Illinois, 406 U.S. 682; Coleman V. Alabama, 399 U.S. 1 but its basic contours, which are identical in State and Federal contexts, Gideon V. Wainwright, 372 U.S. 335; Argersinger V. Hamlin, 407 U.S. 25, are too well established to require extensive elaboration here. Whatever, else it may mean, the right to counsel granted by the Sixth Amendment and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceeding s have been initiated against him ********** Whether by way of formal charge, preliminary hearing, indictment, information, or arraingment '....." Furthermore, Counsel failure, to advise

petitioner that he had the right to Appeal his Guilty Plea, the record will show that no appeal was noted. It is argued that post-trial motions are equally important, as the pre-trial motions. The failure of counsel to perform crucial and vital functions, fatally deprived Appellant of competent representation under the Normal Competency Test adopted by this court, since it is established that counsel is obligated to establish that all available defenses are raised. See: U.S. V. Bennett, 409 F. 2d 888 (2d Cir. 1969). U.S. V. Ash, 413 U.S. 300; U.S. V. Decoster, Supra, at n. 22 that court said the following: ..." Coles V. Peyton, 389 F. 2 d 224, ... Counsel for an indigent defendant should be appointed promptly counsel should be afforded a reasonable opportunity to prepare, to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defense unavailable. Counsel must conduct appropriate investigations both factual and legal, to determine if matters of defense can be developed and to allow himself enough time for reflection and preparation for trial. See: State V. Harper, 57 Wis 2d 543, 205 N. W. 2d 1 (1973)" Also See: Beasley V. United States, 491 F. 2d 687 (1974) The Court of Appeals for the sixth Circuit hold that the defendant had been afforded " Incompetent and ineffective Representation ", it held that before and during trial, the District Court denied Defendant's motion to vacate the sentence and judgement on the ground that his Attorney's performance had rendered the trial as a " farce and a mockery, shocking to the court". The Appeal Court reversed the district court's holding and joined the fifth and District of Columbia Circuits in abandoning the " Farce and Mockery " test as a standard for testing Sixth Amendment claims of ineffective Counsel. Tracing the origin of the Farce and Mockery standard from a view, since rejected, that the Sixth Amendment guaranteed no more than the formal appointment of competent counsel, the court concluded....it said : ... " We hold that the assistance of counsel required under the sixth amendment is counsel reasonably likely to render and rendering reasonably effective assistance.

It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence". See: also Footnotes 18, 21, 22 American Bar Association Project on Standards for Criminal Justice, Standards relating to the Defense function (app. Draft 1972). It is further contended by the Petitioner that due to the nature of his arrest in 1970 regarding narcotic violation, that the prosecution lacked probable cause to have arrested him, first because the informant/agent-cadet, or infromant did not file an affidavit and warrant to arrest him and secondly, there exists a substantial question as to the reliability of the so-called informant. The Petitioner did not sell drugs to the alleged cadet-agent, therefore, there is a reasonable inference as to why the prosecution demanded a speedy trial for fear of police misconduct. The counsel for the petitioner in his defense preparation should have been able to determine these facts inter alia, nonetheless, his failure to act over the 32 month period of time to dispose of the instant case attests to his incompetency.

ARGUMENT III

That Petitioner's home was illegally searched By A Fatally Defective Search Warrant the Prosecution Engaged in Melicious Misconduct.

The Petitioner contends that another major factor which induced and coerced his guilt plea was the innumerious drug charges which the police department of Baltimore City was framing him with, their constant harassing and intimidating his family, in their efforts to remove the Petitioner from the community or the "Streets". The Record will reflect (See: Exhibit (A)) the various times the prosecution or the police department had attempted to have appellant's bond revoked or increased, or fraudulently concock situations which provides them with an opportunity to arrest him. Moreover, case in point, On July 23, 24, and 25, 1973 respectively. The local Baltimore Police Department, the Narcotics Unit, raided the Petitioner's home on successive days and nights

without proper warrants and affidavits to search his premises. That because of Petitioner's wife's refusal to admit the police in her home without proper authorization and documents, the police in retaliation, secured (only) arrest warrant for her, predicated on an unsupported testimony of an alleged anonymous informant, claiming that she was maintaining house of common nuisance, illegal manufacturing, distributing, storaging and concealing a narcotic drug in violation of Maryland's Law Article 27, Section 286 (2) (5). The prosecutor subsequently lodged criminal information See: Exhibits (B & C) against the Petitioner and his wife for manufacturing and distributing narcotics. The warrants are devoid of dates, time, place, or affidavit, nor specification as to the time of these transactions, particularly as they pertain to petitioner's wife. The Petitioner argues that his hired attorney should have diligently debunk this diabolical scheme in which the prosecution had designed in order to induce and coerce petitioner to plead guilty on the then (3) three years-old narcotic charge(s). Furthermore, Exhibit(d) the police purported that they had information of Petitioner's illicit activities, however, lack probable cause to arrest or search his home, however, in failing to gain lawful consent of the appellant's wife to conduct an exploratory search, they use other unlawful means to gain entry to his home. The Fourth and Fourteenth Amendments requires a consent not coerced by explicit or implicit means by implied threat or covert force. For no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the fourth Amendment is directed in the words of a classic admonition in Boyd V. United States, 116 U.S. 616 at 635. " ... It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance.

It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon".

The Petitioner invokes the rationale used in Berger V. United States, 295 U.S. 78 (1935) where the Supreme Court said: " The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. ********** It is fair to say that the average jury, in a greater or less degree has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations and especially, assertations of personal knowledge are apt to carry much weight against the accused when they should properly carry none ....". Although criminal information was dismissed against petitioner's wife, it was done as a part of the plea bargain and not because of the prosecution's desire to insure justice.

ARGUMENT IV

That Petitioner was Denied a Fair and Complete Evidentiary Hearing in the Court Below and The State Courts.

Petitioner contends that as a Pro Se litigant he should have been given a full opportunity to present evidence in support of his claims, particularly, in the light that

he was summarily denied an evidentiary hearing below, secondly, his Motions filed in opposition to Motions of the State for extension of time and summary judgement should have been granted in the light of the fact, that petitioner was not provided access to the records, documents or transcripts or other discoverable items of the state in which to fairly contesting his conviction. That the court below abused its discretion in extending time to the appellee, in that, no exceptional circumstances was shown to warrant said extension of time, the only reasons given was for the need to obtain the post conviction transcript which the appellant did not receive a copy as provided by Rule 4 and 5 Federal Rules of Civil Procedure. However, The appellant points out that from all indications of the Motion for extension of time that the Post Conviction Transcript was not transcribed at the time he noted his application for appeal, then it can be reasonbly inferred that he did not receive an adequate or complete appellate review of the post conviction hearing, which in fact would make the Court of Special Appeals' arbitrarious and capricously denied without affording appellant a fair review on the constitutional questions and claims of law. See: Exhibit (e) Furthermore, The Supreme Court in its vast wisdom, held in Haines V. Kerner, 404 U.S. 519 (1972) a case which concerns Pro Se complaintants, particularly proceedings under 42 U.S.C. Section 1983, reversed a dismissal of a civil action stating: ....." (A)llegations such as those asserted by petitioner, however, inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the Pro Se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears ' beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitled him to relief". at 520". In addition to the Supreme Court's Doctrine regarding pro se litigants, this court has held in Wooten V. Chook, 527 F. 2d 976, (4th Cir.) 1975....That the general rule is that...." Pro Se petitions should be liberally construed...." Moreover, this court takes the position that its District Courts must be especially solicitious of Civil Rights Plaintiffs. See: Canty V. City of Richmond, Virginia Police Department,

383 F. Supp. 1396. E.D. Va. 1974. Affirmed, 526 F. 2d 587 (4th Cir.) Cert Denied, 423 U.S. 1062 (1976). ...There the court said: ...." A civil Rights complaint should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alledged " id at 1399. .... " This solicitude for civil rights plaintiff with counsel must be heightened when a civil rights plaintiff appears Pro Se.... (T)he District Court must examine the Pro Se complaint to see whether the facts alleged, or the set of facts which plaintiff might be able to prove, could very well provide a basis for recovery under any of the Civil Rights acts....accordingly, The Court is considering the Defendant's Motion to dismiss will not permit technical pleading requirements to defeat the vindication of any constitutional rights which the plaintiff alleges, however inartfully, to have been infringed. " id at 1399-1400. Notwithstanding the general holding of the Supreme Court and This Court insofar, as recognizing Pro Se litigant's rights, Petitioner further argues reasons why the court below should have atleast provide him an evidentiary hearing to determine the merits of his constitutional claims, that previous state court findings concerning his guilty plea do not control this Court's review of the issues, nor the court below. Petitioner acknowledges that he has been afforded an evidentiary hearing on the voluntariness of his plea and incompetence of attorney in state court. In Re Proctor V. State of Maryland P.C.P.A. # 2793 in the Criminal Court of Baltimore City. See: Exhibit (f). The finding and holding was so limited and narrow as to not even having to been conducted, for the most part it relied on the trial transcripts, in opposed to the hearing itself to make its determination of the constitutional questions. The State or the Respondant is unable to show that Petitioner voluntarily, knowlingly and intelligently entered guilty plea or whether he waived his constitutional right of self-incrimination or whether the counsel was incompetent. On the basis of the trial court's opinion alone, it cannot be determined what facts that that court used to arrive at its finding. There is no clear factual basis in the record (according to petitioner's limited record and understanding) of that proceeding which

supports the conclusions therein as announced by the Post Conviction and Court Below. Moreover, it is not apparent how the Court applied controlling constitutional standards to arrive at the findings it made, the court's opinion, in effect, is no more than a bare conclusion of law unsupported by pertinent factual findings. See: 28 U.S.C. Section 2254 (d) (8). The Court below should have provided the Petitioner with an evidentiary Hearing. In Townsend V. Sain, 372 U.S. 293 (1963) The Supreme Court held that in Habeas proceedings the federal courts cannot accept state court findings on questions of federal law where the basis for such findings is unclear:..." Reconstruction (of the record) is not possible if it is disposing of the claim. Under such circumstances the state court found the law of the facts adversely to the petitioner's contentions. Since the decision of the state trial of fact may rest upon an error of law rather than an adverse determination of the facts a hearing is compelled to ascertain the facts id at 314".

Similarly, in Bailey V. MacDougall, Supra, The Fourth Circuit reversed the finding of the South Carolina Courts that the prisoner's plea had not been intelligently made, because it could find no factual basis for that conclusion. It looked beyond the bald findings of the State Courts and thus followed the direction of the Court in Townsend V. Sain. (See 28 U.S.C. Section 2254 (e) Both Townsain and Bailey stress that it is improper for the Federal Courts to Summarily adopt the findings and conclusions of state courts when the constitutional guarantee of liberty has been abridged. In both cases, the finding of local and state courts were scrutinized, and something more than ba re conclusions of law was demanded in their support. See 28 U.S.C. Section 2254 (e). The court below bare findings here that petitioner's plea was voluntary, knowing and intelligently given differ little in this respect from the findingssupply little more than bald conclusions. Those findings alone do not warrant the dismissal of Petitioner's petition without a Full and Thorough hearing on the merits of his complaint. It is precisely these questions that the federal judge is commanded to decide "Brown V. Allen,

344 U.S. 443.

In Conclusion, it is the Petitioner's prayer for the foregoing reasons as setforth herein, that this Honorable Court should grant this Petition for Writ of Certiorari and remand it to District Court for a Full and Complete plenary Hearing or Reverse it back to the state court for a New Trial, or what this court deems proper and just.

Respectfully Submitted,

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